lined above.[24] If, on the other hand, the parties are familiar with the law and expressly stipulate that the law most favorable to them shall be applied, the courts are apt to scrutinize the transaction more closely.[25] Thus a penalty is attached to a knowledge of the law. Again, if it appears that a major element of the contract is only nominally at its supposed location and that this would result in an evasion of the usury laws of the place of the real *situs* of the contract, an intent to evade will almost inevitably be found. And finally, we have the case of building and loan associations, where the peculiar policy of many courts has caused a subversion of the general principles applicable to these usury cases.

VIOLATION OF THE SURRENDER CLAUSE IN BILLS OF LADING.—What seems to be a new principle in interpreting the surrender clause in a bill of lading has recently been enunciated by the Supreme Court of the United States in the case of *Pere Marquette Ry.* v. *J. F. French and Co.*[1] The plaintiff had shipped goods over the defendant railway, taking a bill of lading to its own order, containing the usual stipulation that the surrender of the bill of lading should be required before delivery of the goods. The bill was then endorsed in blank and sold to a bank with a draft attached. The bank's agent tortiously delivered the bill, without requiring payment of the draft, to an agent of Marshall and Kelsey, the firm for which the goods were sent. This agent, without even showing the bill of lading, prevailed upon the defendant carrier to deliver the goods, and have them shipped over another road to Marshall and Kelsey, who, however, refused to keep the goods or pay the draft. The bill of lading was sent back to the bank, which returned it to the plaintiff upon payment of the amount advanced on the draft. Plaintiff, having sold the goods for less than the contract price, now sues in trover, on the theory that the carrier, by delivering without surrender of the bill of lading, converted the goods. The conclusion of the Supreme Court was that, although the carrier would be liable where the shipper had suffered any loss through its act, here the loss was caused, not by the act of the carrier at all, but by that of the bank, and hence the defendant was not liable.

This is apparently the first federal adjudication on the exact question involved, at least since the Uniform Bills of Lading Act became effective. The history of the surrender clause, in general, has been a checkered one. Under the earlier cases, it was generally held that a carrier who delivered goods without production of the bill of lading was liable in trover to a *bona fide* purchaser of the bill, before such delivery,[2] and in some jurisdictions even after such delivery.[3] For this reason, when the surrender clause first appeared in bills of lading, it was interpreted by most courts as being inserted only for the protection of the carrier, and the

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[24] Thus, in an excellent and complete note on this subject in 62 L. R. A. 33, it is said, "It will be observed that the qualification as to good faith restricts the operation of the general principle and narrows the choice of laws to those prevailing at the places which are the *situs* of one or more of the important elements or significant circumstances of the transaction."

[25] It must not be forgotten that the mere express stipulation will not of itself constitute bad faith. See footnote 14, *supra*.

[1] (1921) 41 Sup. Ct. 195.

[2] *McEwen* v. *Jeffersonville, etc. R.R.* (1870) 33 Ind. 368; *The Thames* (C. C. 1870) 7 Blatchf. 226; *First Natl. Bank of Peoria* v. *Northern R.R.* (1877) 58 N. H. 203. See *Natl. Commercial Bank of Albany* v. *Lackawanna Transp. Co.* (1901) 59 App. Div. 270, 69 N. Y. Supp. 396, *aff'd.* (1902) 172 N. Y. 596, 64 N. E. 1123; *Anchor Mill Co.* v. *Burlington, etc. Ry.* (1897) 102 Iowa 262, 71 N. W. 255; *Schlesinger* v. *West Shore R.R.* (1900) 88 Ill. App. 273.

[3] *Walters* v. *Western & A. R. Co.* (C. C. 1893) 56 Fed. 369; *Ratzer* v. *Burlington, etc. Ry.* (1896) 64 Minn. 245, 66 N. W. 988 See *Merchants Natl. Bank* v. *Baltimore, etc. Steamboat Co.* (1906) 102 Md. 573, 63 Atl. 108.

shipper was not allowed to recover for its violation, even though he had suffered loss therefrom.[4] It is difficult to see from just what this clause protected the carrier, in those jurisdictions which held that the carrier was not liable even to a *bona fide* purchaser of the bill, after the goods had been delivered. Mere production of the bill would sufficiently provide against any action by a purchaser before delivery, since if it had been endorsed away it could not be produced on delivery. However, reasonably or not, it was almost universally held that the surrender clause could not be availed of by the consignor of the goods.

In the last fifteen years, however, there has been a strong tendency in the other direction, influenced[5] probably by the passage of the Carmack Amendment of 1906 to the Interstate Commerce Act.[6] The cases decided during this period tend toward the position that the surrender clause is intended as a protection, not for the carrier alone, but also for any *bona fide* holder of the bill at any time, whether transferee or consignor; and allow a recovery by the consignor where he is a holder of the bill, for a violation of the clause.[7] And there has been no indication, until the decision in the instant case, that any qualification of, or exception to, the rule would be necessary.

In strict theory it seems hard to justify the distinction drawn by the court. Admitting, as the court does, that trover would lie if there had been damage,[8] how can the absence of damage prevent a recovery? The measure of damages in conversion is generally the value of the goods. If they are accepted back, this will go, not to prevent an action, but only in mitigation of damages, and the measure of the plaintiff's recovery is then the difference between the value of the goods at the time of their conversion, and that at the time of return.[9] The true distinction would seem to be that trover will lie, regardless of damage, where there has been a misdelivery, but not where the goods have been properly delivered. The question, therefore, still remains, whether the delivery in the instant case was a proper one.

This the court answers by citing the ninth section of the Uniform Bills of Lading Act, providing that a carrier is justified in delivering "to any person in possession of an order bill of lading properly endorsed," and arguing that the agent of Marshall and Kelsey was such a person, and that, therefore, there was

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[4] *Chicago Packing, etc. Co.* v. *Savannah, etc. Ry.* (1897) 103 Ga. 140, 29 S. E. 698; *Gates* v. *Chicago, etc. R.R.* (1894) 42 Neb. 379, 60 N. W. 583. But see *Garden Grove Bank* v. *Humeston, etc. Ry.* (1885) 67 Iowa 526, 535, 25 N. W. 761. *Contra, Jeffersonville, etc. R.R.* v. *Irvin* (1874) 46 Ind. 180.

[5] *Babbitt* v. *Grand Trunk, etc. Ry.* (1918) 285 Ill. 267, 120 N. E. 803. See *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491, 506, 33 Sup. Ct. 148.

[6] (1906) 34 Stat. 595, U. S. Comp. Stat. (1916) § 8604a.

[7] *Babbitt* v. *Grand Trunk, etc. Ry., supra,* footnote 5; *Turnbull* v. *Mich. Cent. R.R.* (1914) 183 Mich. 213, 150 N. W. 132; *Judson* v. *Minneapolis, etc. R.R.* (1915) 131 Minn. 5, 154 N. E. 506. See *First Natl. Bank of Clarkston* v. *Oregon-Wash. R.R.* (1913) 25 Idaho 58, 136 Pac. 798. *Contra, Famous Mfg. Co.* v. *Chicago, etc. Ry.* (1914) 166 Iowa 361, 147 N. W. 754. See *St. Louis, etc. Ry.* v. *Gilbreath* (Tex. 1912) 144 S. W. 1051.

[8] It is possible to argue that trover should not lie in any case, as there are some examples of breaches of terms of bailment which are not conversion. *Moore* v. *McKibbin* (N. Y. 1860) 33 Barb. 246. And in such case there would be no inconsistency in the court's position. But, for a violation like that in the present case, trover has been held to lie. *Foggan* v. *Lake Shore, etc. Ry.* (1891) 61 Hun 623, 16 N. Y. Supp. 25; and it seems now to be well settled as a remedy where there is damage. *Supra,* footnote 7.

[9] *Gove* v. *Watson* (1881) 61 N. H. 136; *Green* v. *Stephens* (1889) 37 Mo. App. 641; *Stillwell* v. *Farwell* (1892) 64 Vt. 286, 24 Atl. 243; *Delano* v. *Curtis* (Mass. 1863) 7 Allen 470. And this is so even though the deterioration in the value of the property is due to its inherent quality, and not to the fault of the converter. *Lucas* v. *Trumbull* (Mass. 1860) 15 Gray 306.

no conversation. But, while it is true that the person to whom delivery was made was the proper kind of person to whom to make delivery, must it follow that the conditions under which delivery was made were also proper? It seems hardly sound to say that if there were an express stipulation in the bill that the carrier was not to deliver to the consignee before a certain day, the carrier would nevertheless be justified in so doing, because the consignee is the right kind of person to whom to make delivery. It may well be argued, however, that the surrender clause did not constitute a requisite condition for proper delivery, as the interests of the consignor would be equally well protected by requiring mere possession of the bill of lading by the deliveree. But the very cases decided after the Carmack Amendment, which the court cites with approval,[10] base a recovery by the consignor directly upon the surrender clause, and specifically state the clause itself is for the benefit of the consignor as well as for the protection of the carrier. Actual surrender of the bill, therefore, seems to be a requisite for proper delivery.

Four cases are cited by the court for its main proposition, that

"where delivery is made to a person who has the bill, or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct, the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion."[11]

These cases were all decided either on the earlier theory that the surrender clause was inserted for the benefit of the carrier only[12] or on a collateral point.[13] In none of them is the question of damage by the non-compliance treated as of any importance whatever.

And it seems difficult to support the case from the point of view of abstract justice. The defendant, though it breached a duty, really did no harm, and therefore perhaps should not be held liable in the instant case. The real fault lay with the bank. But, if the facts were slightly different we might have a different story. In this case the draft was sold outright to the bank. But, supposing that the bank had been only the plaintiff's agent for collection, it might argue, if the plaintiff sought to hold it liable, that its breach was not the cause of the plaintiff's damage, since the possession of the bill by the consignee was not what made delivery possible. The railroad delivered regardless of the consignee's possession of the bill. Therefore, the argument would run, the bank is no more guilty than the railroad; and the plaintiff, because two torts had been committed against him, would be able to recover for neither.

Nor does it seem that the decision can be justified on the ground of policy, or commercial convenience. For it is hard to see what policy should prevent the carrier from paying the penalty of its negligence, when it might have complied with the terms of its contract, with practically no trouble, and no increase whatever in its liability to third persons.[14] Moreover, it would seem to be to the interest of the business world in general that as few bills of lading as possible that do not actually represent goods should be outstanding. And the best way to accomplish this seems to be to make the carrier liable for its failure to use due care, in every case where this is legally possible.

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[10] See *supra*, footnote 7.

[11] *Pere Marquette Ry.* v. *French, supra*, footnote 1, p. 199.

[12] *Chicago Packing, etc. Co.* v. *Savannah, etc. Ry., supra*, footnote 4; *Famous Mfg. Co.* v. *Chicago, etc. Ry., supra*, footnote 7.

[13] *Nelson Grain Co.* v. *Ann Arbor R.R.* (1913) 174 Mich. 80, 140 N. W. 486; *St. Louis, etc. Ry* v. *Gilbreath, supra*, footnote (7).

[14] The carrier is exempted from liability for not delivering without a surrender of the bill of lading by Uniform Bills of Lading Act, § 11.